Tentative Rulings for July 12, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

14CECG00572 ***Baldwin v. Aon Risk Services*** **(Dept. 403) [Hearing on motion to seal continued to August 4, 2016, at 3:30 p.m. in Dept. 403]**

14CECG03347 ***Jane Doe No. 1 v. Estate of Lance Clement et al.*** **is continued to July 14, 2016 at 3:30 p.m. in Dept. 501. (Motion – Summary Judgement)**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: ***D'Ambrosio v. Cortez***
Superior Court Case No.: 16CECG00781

Hearing Date: July 12, 2016 (**Dept. 403**)

Motion: Demurrer by Defendant Estella Cortez

Tentative Ruling:

To take the hearing off calendar, and to grant Estella Cortez 20 days within which to comply with Code of Civil Procedure section 430.41; specifically, to meet and confer with Plaintiff Frank D'Ambrosio concerning the issues raised by the demurrer. If the parties cannot agree on the purported deficiencies in the complaint, Defendant Estella Cortez may calendar another hearing date for the demurrer and must comply with Code of Civil Procedure section 430.41 in doing so. If the parties need more time to meet and confer, they may submit a stipulation pursuant to The Superior Court of Fresno County, Local Rules, rule 2.7.2, showing good cause for more time pursuant to Code of Civil Procedure section 430.41, subdivision (a)(2). If the parties agree that a first amended complaint will be filed, they may submit a stipulation pursuant to The Superior Court of Fresno County, Local Rules, rule 2.7.2, permitting such an amendment.

Explanation:

Beginning in 2016, Code of Civil section 430.41 imposes meet and confer and other requirements on demurring defendants that Defendant Estella Cortez did not comply with.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 7/11/16 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Granite State Insurance Company v. Sims***
Court Case No. 14CECG01972

Hearing Date: **July 12, 2016 (Dept. 403)**

Motion: Plaintiff's Application for Default Judgment

Tentative Ruling:

To order off calendar as nothing new has been filed since the most recent prove-up hearing on March 15, 2016, at which time the request for judgment was denied. See the minute order for that hearing for details.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 7/11/16 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Maxco Supply, Inc. v. Barajas, et al.***
Court Case No. 14 CECG 01781

Hearing Date: July 12, 2016 (Dept. 403)

Motion: Plaintiff's Motion for Attorney's Fees

Tentative Ruling:

To grant in the amount of $69,862.45. To sua sponte strike the abstract of judgment and to recall the writ of execution. Plaintiff is ordered to provide this department a form of judgment in conformity with this Court's statement of decision, which must include its untaxed costs of suit and the attorney's fees herein awarded within 5 days of the clerk's service of this minute order.

Explanation:

1. The Motion is Not Untimely

Defendant asserts that because attorney's fees are claimed as costs they are subject to the timing rule set forth in California Rule of Court 3.1700. This is incorrect. Rule 3.1700 controls when a memorandum of costs must be filed. Rule 3.1702, subdivision (b) controls when a motion for contractual attorney's fees incurred "up to and including the rendition of judgment" must be filed. Subdivision (b) states that a motion to claim such attorney's fees "must be served and filed within the time for filing a notice of appeal under rules 8.104 and 8.108 in an unlimited civil case." (Cal. Rules of Court, rule 3.1702(b)(1).) Rule 8.104, subdivision (a)(1) specifies that a notice of appeal must be filed on or before the earliest of: (A) 60 days after the superior court clerk serves "a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was served"; (B) 60 days after a party serves "a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service"; or (C) 180 days after entry of judgment. Thus, a prerequisite for the filing of a motion for attorney's fees is the entry of judgment.

Although a statement of decision is generally not considered a judgment (*Industrial Indemnity Co. v. City and County of San Francisco* (1990) 218 Cal.App.3d 999, 1003, fn. 3), courts look to "the substance and effect of the adjudication" to determine whether it meets the definition of a judgment provided in Code of Civil Procedure section 577 – "the final determination of the rights of the parties in an action or proceeding." (See *MHC Financing Ltd. Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1392.) Accordingly,"[a] memorandum of decision *may* be treated as an appealable order or judgment when it is signed and filed, and when it constitutes the trial judge's determination on the merits. [Citations.]" (*Estate of Lock* (1981) 122 Cal.App.3d 892, 896.) Accordingly, the motion is timely.[1]

[1] Now that the Court is aware that no formal Judgment has been issued, it intends to issue one.

Moreover, even a premature motion for attorney fees may be granted where there is no prejudice to the opposing party. In *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, the prevailing party's motion for attorney's fees was filed a little over a month after the stipulated judgment was reached, but almost two months before judgment was entered. The appellate court held that the defendant's bare claim the motion was untimely was insufficient in the absence that the delay prejudiced or misled it. Here, defendant claims he is prejudiced because he cannot appeal the where there is no judgment or notice of entry of judgment, in effect holding defendant "hostage" forcing him to pay attorney's fees and damages "with no viable means for legal redress through appeal or other review."

As an initial matter, defendant is as able as plaintiff to submit a formal judgment for the court's signature. Second, defendant may appeal the statement of decision under the authority of *MHC Financing Ltd. Partnership Two v. City of Santee*, *supra*, 125 Cal.App.4th at p. 1392 and *Estate of Lock*, *supra*, 122 Cal.App.3d at p. 896. There is no denial of due process here. Finally, this is not the type of prejudice the law prohibits. (*Hoover Community Hotel Development Corp. v. Thomson* (1985) 168 Cal.App.3d 485, 488 fn. 4 [prejudice is "that, if any, occasioned by a change of position or disadvantage incurred prior to the trial court's action and which is caused by the delay in seeking costs."].) Because defendant does not allege he has changed his position in reliance on the timing of an attorney's fees award, he cannot claim prejudice due to the timing of this motion.

2. Plaintiff Has Proven the Existence of a Contract Supporting Attorney's Fees

The "Customer Information and Agreement" attached as Exhibit A to the Declaration of attorney Stephen M. Koch was authenticated and admitted into evidence at trial as a contract between the parties. The top three quarters of the page is used for customer information and a credit application, but the bottom portion is contained in a border and is entitled "Delinquency charges – Attorney's Fees – Financial Disclosure." Directly beneath this boxed text is defendant's signature. The text states, in relevant part, "The undersigned agrees to pay in full and in accordance with the terms of sale as indicated on Maxco's invoices. … The undersigned agree to pay Maxco's reasonable attorney's fees and costs in connection with the collection of all past due account balances, or any other amounts owing to Maxco by the undersigned." This Customer Information and Agreement, along with the invoices constitute a contract. (See Com. Code, § 2201; *Myers Building Industries, Ltd. v. Interface Technology, Inc*. (1993) 13 Cal.App.4th 949, 967 ["Several documents concerning the same subject and made as part of the same transaction will be construed together even if the documents were not executed contemporaneously."].)

Defendant relies on *Boyd v. Oscar Fisher Co*. (1989) 210 Cal.App.3d 368 to argue that the attorney's fee provision does not apply. This case does not support defendant's position. In *Boyd*, an attorney fees clause was contained in invoices but not in the agreement between the parties and the court awarded attorney's fees. Defendant argues that *Boyd* supports the proposition that where the situation is reversed, as here, i.e., where the invoices do not contain an attorney's fees provision, but the master contract does, an award of attorney's fees is untenable. First, it is well

established that cases are not authority for propositions not considered. (*Kinsman v. Unocal Corp*. (2005) 37 Cal.4th 659, 680.) Second, the analysis in *Boyd* supports an award of attorney's fees. The *Boyd* court held: "Courts will construe together several documents concerning the same subject and made as part of the same transaction ... even though the documents were not executed contemporaneously ... and do not refer to each other." (*Id*. at p. 378.) Accordingly, the invoices must be read with the contract which provides for attorney's fees. (See also *Ganey v. Doran* (1987) 191 Cal.App.3d 901, 236 [neither promissory note nor addendum contained an attorney's fees provision, but purchase contract did, thus, award of attorney's fees was proper on action on promissory note and addendum, as all agreements constituted one contract].)

3. Plaintiff is the Prevailing Party on the Contract

"Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . .." (Code Civ. Proc., § 1021.) As set forth above, the contract between the parties provides for attorney's fees "in connection with the collection of all past due account balances, or any other amounts owing to Maxco." Code of Civil Procedure section 1033.5 provides, in subdivision (a)(10), that attorney fees are "allowable as costs under Section 1032" when they are "authorized by" either "Contract," "Statute," or "Law."

Civil Code section 1717 provides, in relevant part:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

(Civ. Code § 1717, subd. (a).)

"[T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (Civ. Code, § 1717, subd. (b).) If a party has an unqualified win, the trial court has no discretion to deny the party attorney fees as a prevailing party under Civil Code section 1717. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.)

Here, plaintiff prevailed both on the contract, which was clearly an action to collect "amounts due Maxco," and on the cross-complaint. Plaintiff may also recover its attorney's fees incurred for the defense of the cross-complaint. The contractual language "*in connection with the collection* of all past due account balances, or any other amounts owing to Maxco by the undersigned" is broad enough to encompass a cross-complaint filed in a collection action which alleges breach of contract and claims of offset, including fraud.

Moreover, if a party prevails in the litigation, which plaintiff has done, that party is entitled to his fees for litigating that entire action. (*Akins v. Enterprise Rent-A-Car Co*. (2000) 79 Cal.App.4th 1127, 1134.) "Where a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under [Civil Code] section 1717 [, rendering unilateral attorney's fees provisions reciprocal,] only as they relate to the contract action." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.) Nonetheless, attorney fees are recoverable on other causes of action to the extent the other causes of action or other issues therein are so " ' "inextricably intertwined" ' " with the issues raised in the contract causes of action as to make apportionment of the attorney fees " 'impracticable, if not impossible.' " (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111.) "Attorney's fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories." (*Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493.)

Here, the breach of contract and the fraud claims are sufficiently interrelated such that separating out the attorney's fees would be impracticable.

4. Amount of Fees

While defendant has not challenged the amount of fees to be awarded, the court may only award a reasonable fee. (Code Civ. Proc., §§ 1032, 1033.5, subd. (c)(3); *Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1399.)

A. The Lodestar

A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." (*Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 48.) Here, defendant seeks a loadstar of $71,426.95 ($22,431.25 + $48,995.70.) As our Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably expended* multiplied by the *reasonable* hourly rate. . . ." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095, italics added; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.) The California Supreme Court has noted that anchoring the calculation of attorney fees to the lodestar adjustment method "'is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.' " (*Serrano III*, *supra*, 20 Cal.3d at p. 48, fn. 23.)

i. Number of Hours Reasonably Expended

While the fee awards should be fully compensatory, the trial court's role is not to simply rubber stamp the defendant's request. (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1133.) Rather, the court must ascertain whether the amount sought is reasonable. (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 361.) However, while an attorney fee award should ordinarily include compensation for all hours reasonably spent, inefficient

or duplicative efforts will not be compensated. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321.) The person seeking an award of attorney's fees "is not necessarily entitled to compensation for the value of attorney services according to [his] own notion or to the full extent claimed by [him]. [Citations.]" (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist*. (1985) 172 Cal.App.3d 914, 950.)

"Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary … " (*Hensley v. Eckerhart*, *supra*, 461 U.S. at p. 434, citing *Copeland v. Marshall* (1980) 641 F.2d 880, 891 (en banc).)

Clerical Tasks

"[P]urely clerical or secretarial tasks should not be billed …, regardless of who performs them." (*Missouri v. Jenkins* (1989) 491 U.S. 274, 288.) Here, Mr. Bassett's paralegals billed time for non-legal clerical tasks including making photocopies, filing and serving documents, word-processing and communicating with the court. (See, for example entries dated 4/27/15 for timekeeper Silveira: "Copy, file and serve motion to compel" and 9/915 "… made three sets of copies of invoices and correspondence to provide at upcoming deposition" for timekeeper Thornhill.) These tasks are not compensable. A deduction of 14.9 hours at a rate of $105 is recommended, for a total reduction of $1,564.50.

ii. Reasonable Hourly Compensation

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type" (Ketchum v. Moses, supra, 24 Cal.4th at p. 1133.) Ordinarily, "'the value of an attorney's time . . . is reflected in his normal billing rate.'" (*Mandel v. Lackner* (1979) 92 Cal. App. 3d 747, 761.)

The billing rate of $188 per hour for Mr. Koch, who has been practicing law for 14 years, is reasonable, as is the $199 per hour billing rate for Mr. Bassett, who has been practicing law for 19 years.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 7/11/16.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(28) **Tentative Ruling**

Re: ***Khosa v. Huff, et al.***

Case No. 15CECG02044

Hearing Date: July 12, 2016 (Dept. 501)

Motion: By Defendant Sandra K. Huff demurring to the Third Amended Verified Complaint of Plaintiff Khosa.

Tentative Ruling:

To sustain the demurrer with leave to amend.

Plaintiff shall have ten days from the date of this order in which to file a Fourth Amended Complaint. All new or amended allegations shall be set forth in **boldface** typeset.

Explanation:

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) The standard of pleading is very liberal and a plaintiff need only plead "ultimate facts." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) However, a plaintiff must still plead facts giving some indication of the nature, source, and extent of the cause of action. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

Moreover, where there are several causes of action in the complaint, a demurrer to the entire complaint may be overruled if any cause of action is properly stated. (*Warren v. Atchison, Topeka & Santa Fe Ry. Co.* (1971) 19 Cal.App.3d 24, 36.)

Further, if the essential facts of some valid cause of action are alleged, even if unintended by the plaintiff, the complaint is good against a general demurrer. (*Quelimane Co. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 38-39 ("[W]e are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory. The courts of this state have ... long since departed from holding a plaintiff strictly to the 'form of action' he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained.")

Here, Defendant has filed a general demurer to the "complaint and each cause of action" on the grounds that the claims are barred by the statute of frauds.

As set forth in the previous rulings on the matter, Defendants are correct the causes of action listed in the TAC are not sustainable under a straight-forward statute of frauds defense or on Plaintiff's proffered explanation that the contract was partly performed.

The statute of frauds generally bars a contract for the sale of real property which is not memorialized in a writing. (Civil Code § 1624(a)(3); *Maynes v. Angeles Mesa Land Co.* (1938) 10 Cal.2d 587, 590.) However, an oral contract for real property is nevertheless enforceable where the buyer establishes part performance in reliance on the agreement. (CCP §§ 1971; 1972.)

Part performance requires the buyer to have taken possession of the subject property and either tendered payment or made substantial improvements thereon. (*Anderson v. Stansbury* (1952) 38 Cal.2d 707, 715-716; *Halloran v. Isaacson* (1949) 95 Cal.App.2d 357, 366-367; *Harrison v. Hanson* (1958) 165 Cal.App.2d 370, 376; see Miller and Starr, 1 California Real Estate § 1:76 (4th Ed.).)

The change in possession is essential - simply tendering a down payment is wholly insufficient. (see *Engasser v. Jones* (1948) 88 Cal.App.2d 171, 176; *Secrest v. Security Nat. Mortg. Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 556 [payment of money is insufficient as there is an adequate remedy at law.].) Accordingly, at minimum, the plaintiff is required to allege a change in possession of the property occurred. (*Harrison*, *supra*, 165 Cal.App.2d at 376; *Halloran*, *supra*, 95 Cal.App.2d at 367; *Hambey v. Wise* (1919) 181 Cal. 286, 291 [actual physical possession is required – "mere technical possession" insufficient {citations omitted}.].)

Here, the Third Amended Complaint does not allege the plaintiff took possession of the property, tendered payment or made substantial improvements. Moreover, although the plaintiff alleges 1500 almond trees were purchased, the trees were never planted, i.e. there was neither possession nor improvements made. (TAC, ¶ 11.) Consequently, without allegations of possession and substantial improvements, there is no basis for the part performance exception to the statute of frauds. (*Anderson*, *supra*, 38 Cal.2d at 715-716; *Halloran*, *supra*, 95 Cal.App.2d at 366-367; *Harrison*, *supra*, 165 Cal.App.2d at 376.) So the Plaintiff cannot rely on the part performance exception to the statute of frauds.

The TAC does allege that the contract was partially oral and partially written. So the demurrer cannot be sustained on those grounds.

However, despite this, the Third Amended Complaint does appear to state a cause of action for promissory estoppel. The elements of promissory estoppel are: "(1) a clear promise, (2) reliance, (3) substantial detriment, and (4) damages measured by the extent of the obligation assumed and not performed." (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692.) Here, Plaintiff has alleged a promise to sell the property (TAC

¶7); (2) reliance in terms of the purchase of the almond trees (TAC ¶¶ 11, 16); (3) substantial detriment in the form of the purchase and allocation of the trees (TAC ¶¶ 11, 16); and (4) damages in the form of those trees (TAC ¶¶ 11, 16). Thus, the Third Amended Complaint appears to allege all the elements of a promissory estoppel claim. If this reading of the TAC is correct, then the demurrer should be overruled, since the pleading does state at least one cause of action. (*Quelimane Co., supra,* 19 Cal.4th at 38-39.)

Furthermore, it has been held that the doctrine of estoppel can preclude reliance upon the statute of frauds as a defense. (*Associated Creditor's Agency v. Haley Land Co.* (1966) 239 Cal.App.2d 610, 617 ("The doctrine of estoppel to assert the statute of frauds as a defense is applicable where a party, by words or conduct, represents that he will stand by his oral agreement, and the other party, in reliance upon that representation, changes his position, to his detriment.") Here, there are allegations that Defendant Huff made an oral agreement and that Plaintiff changed their position to their detriment. As a result, the Third Amended Complaint could be read as stating the promissory estoppel exception to the statute of frauds.

Because neither party briefed whether the Third Amended Complaint states either a cause of action for promissory estoppel, or whether Defendant is estopped from asserting the statute of frauds defense, the Court continued the hearing for further briefing.

Defendant's brief in response argued that plaintiff has not alleged "reasonable and foreseeable reliance" nor that he had been financially injured by the reliance. (*U.S. Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901-02.) Defendant argues that the Plaintiff's allegation that he was "allocating" trees for planting in reliance on defendant's alleged promise was "unexpressed" or hidden based on Plaintiff's prior pleadings. However, the Third Amended Complaint does allege that "Plaintiff and Defendant Huff agreed that Plaintiff would be permitted to begin farming the Property immediately once escrow was opened." (TAC ¶8.) Whether or not this discussion would render Plaintiff's reliance reasonable or not is unclear, but there is at least a basis for such an allegation in previous complaints.

As Defendant does point out, to be the basis for a promissory estoppel claim, any promise must be "clear and unambiguous" and the reliance must be "reasonable and foreseeable." (*U.S. Ecology, supra,* 129 Cal.App.4th at 901.) Such allegations do not expressly appear in the Third Amended Complaint. The Court cannot say that this defect cannot be corrected if Plaintiff can validly make those factual allegations. (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 484 (court should grant leave to amend if in all probability plaintiff will cure defect).) Therefore, the Court sustains the demurrer with leave to amend to allege promissory estoppel as a separate cause of action, if Plaintiff can so allege.

Defendant places great store in the fact that Plaintiff has not alleged such elements hitherto, but the only question in considering whether leave to amend should be allowed is whether those prior pleadings actually preclude Plaintiff from making

these allegations. (*E.g., Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044.) Defendant has pointed to no such prior allegations.

Finally, Defendant distinguished *Associated Creditor's Agency, supra,* 239 Cal.App.2d at 617, on the grounds that the case was based on an oral agreement to procure a lease to real property, and not on an agreement to purchase land. (Defendant's Brief at p. 2.) However, Defendant has cited no cases foreclosing the use of promissory estoppel to estop a defendant from relying on the statute of frauds as a defense to an oral land sale agreement. However, while the use of promissory estoppel to prevent reliance on the statute of frauds to an oral agreement in general would appear to be well-settled (s*ee Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1068-69 (listing cases)), Plaintiff has cited to no cases showing that such an avenue is open to him with respect to an oral agreement for the sale of land. Therefore, the Court will sustain the demurrer with leave to amend as to all the causes of action with leave to amend.

Plaintiff may, if such claims have a basis in the interactions between the parties and in the law, allege facts showing an entitlement to promissory estoppel as an independent cause of action, and showing why defendant should be estopped from relying on the statute of frauds defense to an oral contract for the sale of land.

The Court is mindful that Plaintiff has had four attempts to validly allege a cause of action, and notes that he may not necessarily rely on being able to have another chance to amend. (*See, e.g., Archuleta v. Grand Lodge of Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO,* (1968) 262 Cal.App.2d 202, 209 ("Where plaintiffs fail to allege a cause of action after numerous, successive attempts and without overcoming the same grounds for demurrer, the natural, probable and reasonable inference is that they are, under the circumstances, incapable of amending the pleadings to allege a good cause of action.")

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 7/11/16.
(Judge's initials) (Date)

Tentative Rulings for Department 502

(20) **Tentative Ruling**

Re: ***J. Fletcher Creamer & Son, Inc. v. CVIN, LLC***
Superior Court Case No. 13CECG00247

Hearing Date: **July 12, 2016 (Dept. 502)**

Motion: J. Fletcher Creamer & Son, Inc.'s ("JFC") Motion for Summary Adjudication

Tentative Ruling:

To deny. (Code Civ. Proc. § 437c(f)(1).)

Explanation:

JFC does not address in its moving papers the statutory authority for this motion for summary adjudication. JFC appears to seek summary adjudication in its favor of the merits of its 15th affirmative defense to CVIN's first amended cross-complaint, the effect of which is to cut off some of CVIN's damages at a certain point on two of the six contracts at issue in this action. (See Notice of Motion 3:9-20.)

"A party may move for summary adjudication as to … one or more affirmative defenses …, if that party contends … that there is **no merit** to an affirmative defense as to any cause of action … . A motion for summary adjudication shall be granted only if it completely disposes of … an affirmative defense …." (Code Civ. Proc. § 437c(f)(1), emphasis added.) Since the motion is not brought on the ground that the affirmative defense has "no merit," the motion is improper inasmuch as it seeks to establish the merits of the 15th affirmative defense.

Nor would the motion be proper as pertaining to an "issue of duty." JFC does not contend that it seek to adjudicate an issue of duty. It basically contends that the 15th affirmative defense cuts off CVIN's damages following the demand for security and JFC's suspension of work. And even if the motion were construed as such, the motion must completely dispose of the issue of duty and not be a piecemeal motion challenging only one portion of liability. (Code Civ. Proc. § 437c(f)(1); *Regan Roofing Co., Inc. v. Superior Court* (1994) 24 Cal.App.4th 425, 436.) "[T]he intent behind the change in subdivision (f): 'It is also the intent of this legislation to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or a defense." *(Id.* at p. 433.)

Even if JFC is requesting an order establishing that it had no duty to perform under the Segment 20 and 24 contracts after it demanded security, the motion neither resolves a cause of action, nor does it dispose of the issue of JFC's duties and

obligations under the contracts for these two segments, much less all of the contracts at issue in this action.

Because the motion does not seek summary adjudication of a matter authorized by Code of Civil Procedure section 437c(f)(1), the motion must be denied.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/6/16 .
(Judge's initials) (Date

(2)

Tentative Ruling

Re: ***Garcia et al. v. Estate of Lance Clement***
Superior Court Case No. 14CECG03347

Hearing Date: July 12, 2016 (Dept. 502)

Motion: Orange Center Elementary School's motion to compel response to request for production, set four

Tentative Ruling:

To deny Defendants' Orange Center Elementary School's motion to compel Plaintiff Jane Doe 5 to provide verified responses to request for production, set four (erroneously numbered set three). (Code of Civil Procedure section 2031.300(b).)

Explanation:

Prior to the filing of the motion the plaintiff personally served responses in substantial compliance with Code of Civil Procedure section 2031.230.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/5/16.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Corral v. Beazer Homes***
Court Case No. 12CECG00937

Hearing Date: July 12, 2016 (Department 502)

Motion: by plaintiff in intervention St. Paul Mercury Insurance Company and St. Paul Surplus Lines Insurance Company ("St. Paul") to bifurcate

Tentative Ruling:

To deny, without prejudice.

Explanation:

St. Paul states it defends this case under a reservation of rights, on behalf of Beazer, which was named as an additional insured to policies of insurance that St. Paul issued to cross-defendants Don Black and Elite Landscaping. St. Paul seeks to have its complaint in intervention bifurcated from the rest of the case. St. Paul seeks recovery of attorneys' fees it has paid out in Beazer's defense. St. Paul argues that bifurcation is necessary to avoid mention of insurance in the main case, as such is prohibited by Evidence Code section 1155. That statute states: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing."

The cross-complaint in this case by Beazer alleges that the cross-defendants (including St. Paul's insureds) breached a contract with Beazer which required each of those cross-defendants to obtain insurance coverage which named Beazer as an additional insured. It is not possible to avoid mention of insurance through bifurcation; whether or not insurance was procured is a main point of contention in the cross-complaint. The cross-complaint also seeks a declaration was to which cross-defendants owe a duty to Beazer to provide it with a defense and/or indemnity, which also affects any claim by St. Paul for recovery of fees it has paid. The motion fails to carry its burden of persuasion that bifurcation would benefit the parties or the Court.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/6/16 .
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Kim v. LCN Ventures LLC***

Case No. 12CECG02471

Hearing Date: July 12, 2015 (Dept. 502)

Motion: By Defendant Lance-Kashian & Company for Summary Judgment.

Tentative Ruling:

To continue the motion to August 2, 2016, at 3:30 p.m. in Department 502 for further briefing on the matters discussed below. Further briefing by Plaintiff shall be due by July 19th, 2016. Any reply brief shall be filed by Defendant no later than July 26th, 2016.

Explanation:

To obtain summary judgment, "all a defendant needs to do is to show that the plaintiff cannot establish at least one element of the cause of action." *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853. If a defendant makes this showing, the burden shifts to the plaintiff to demonstrate that one or more material facts exist as to the cause of action or as to a defense to a cause of action. (CCP § 437(c), subdivision(p)(2).)

In a summary judgment motion, the pleadings determine the scope of relevant issues. (*Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.) A defendant need only "negate plaintiff's theories of liability *as alleged in the complaint;* that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton v. Fidelity Nat'l Title Co.* (2013) 213 Cal.App.4th 486, 493 (emphasis in original).)

The court examines affidavits, declarations and deposition testimony as set forth by the parties, where applicable. (*DeSuza v. Andersack* (1976) 63 Cal.App.3d 694, 698.) Any doubts about the propriety of summary judgment are to be resolved in favor of the opposing party. (*Yanowitz v. L'Oreal USA, Inc.* (2003) 106 Cal.App.4th 1036, 1050.)

A court will "liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.)

Here, Defendant largely bases its motion on the line of cases holding that it does not owe a duty of care to Plaintiff due to Plaintiff's status as an independent contractor, following the so-called "*Privette*" line of cases, after *Privette v. Superior Court* (1993) 5 Cal.4th 689 and subsequent related cases.

Defendant largely relies specifically on *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, for the proposition that "[w]hen an independent contractor is hired to perform inherently dangerous construction work, that contractor, unlike a mere employee, receives authority to determine how the work is to be performed and assumes a corresponding responsibility to see that the work is performed safely. The independent contractor receives this authority over the manner in which the work is to be performed from the hirer by a process of delegation." (*Id.* at 528.) As a result, a defendant general contractor could not be held vicariously liable on a theory of "peculiar risk" (which is defined as "neither a risk that is abnormal to the type of work done, nor a risk that is abnormally great" and for which hirers of independent contractors are liable to third parties for injuries resulting from the work). (*Id.* at 524, 528-29.) However, the *Tverberg* case left open the question of whether the hirer could be held *directly* liable on a theory that it retained control over safety conditions at the jobsite. (*Id.* at 529.)

However, although not briefed by either party, to the Court, the *Privette* line of cases does not appear to be applicable to the present case. Such cases answer the question of whether and when the *hirer* of an independent contractor is liable for negligence as a result of work done by or work involving the independent contractor's employees or subcontractors. (*See, e.g., Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 667-672 (listing cases).) *Kinsman* itself dealt with the question of what premises liability duty a landowner owes to the employee of an independent contractor when the *landowner hired the independent contractor*. (*Id.* at 672-73.) However, all of the *Privette* cases appear to be inapposite because Defendant did not hire Plaintiff, nor is there any evidence that Defendant was hired as the result of any contract between Defendant and any co-Defendant. Therefore, the relationship of hirer to independent contractor, and the damages caused by or involving the independent contractor's works, are irrelevant to this case.

If this is the case, then the case is better analyzed as a simple negligence and premises liability case by an invitee against the landowner for an allegedly hazardous condition under the standards first set out in *Rowland v. Christian* (1968) 69 Cal.2d 108, 118-19 and followed in many other cases.

Therefore, the Court will continue the hearing and directs the parties to provide further briefing on whether the *Privette* line of cases is applicable to the current case and, if not, whether Defendant has carried its burden of negating the elements of the causes of action pleaded by Plaintiff in his complaint.

The hearing is continued to August 2, 2016, at 3:30 p.m. in Department 502 for further briefing. Further briefing by Plaintiff shall be due by July 19th, 2016. Any reply brief shall be filed by Defendant no later than July 26th, 2016.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/11/16 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Engs Commercial Finance Co. v. California Freight, Inc. et al.***
Court Case No. 16 CECG 01478

Hearing Date: July 12, 2016 (Dept. 502)

Motion: Plaintiff's Writ of Possession

Tentative Ruling:

To deny without prejudice.

Explanation:

The application for a writ may be granted if the plaintiff shows (1) the basis of his claim and that the plaintiff is entitled to possession of the property claimed; (2) that the property is wrongfully detained by the defendant, the manner in which the defendant came into possession of the property, and (on information and belief) the reason for detention; (3) a particular description of the property and a statement of its value, (4) the location of the property. (Code Civ. Proc., § 512.010.)

1. Basis of the Claim & Entitlement to Property

To obtain a writ of possession, plaintiff has to show it has the right to immediate possession of tangible personal property and that defendants are wrongfully withholding that property. (Code Civ. Proc., § 512.010.) A writ of possession may issue only if the plaintiff has established the probable validity of the plaintiff's claim, i.e., that "it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." (Code Civ. Proc., §§ 511.090, 512.060, subd. (a)(1); *Simms v. NPCK Enterprises, Inc*. (2003) 109 Cal .App.4th 233, 242.) If plaintiff's right to possession is based upon a written instrument (e.g., promissory note or security agreement), a copy of the instrument must be attached to the application. (Code Civ. Proc., § 512.010, subd., (b)(1).) The Agreement is not attached to the Application. This is one ground for denying the Writ of possession.

At the hearing on the application for a writ of possession, the plaintiff must at least establish a prima facie case. If the defendant makes an appearance, the court must then consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation. (Legislative Committee Comment to Civ. Proc. Code, § 511.090.) The burden of proof rests on the plaintiff to establish the probable validity of his or her claim. He or she will fail to satisfy this requirement if the defendant shows that there is a reasonable probability that he or she can assert a successful defense to the action. (Legislative Committee Comment to Civ. Proc. Code, § 512.060.)

Here, plaintiff relies on the declaration of Jose Cosme, a Senior Asset Recovery Specialist for plaintiff. Cosme is one of the persons charged with the responsibility for the collection of obligations that plaintiff sues on. He is required to know, and is very familiar with the jobs of plaintiff's employees as they relate to making bookkeeping entries and maintaining other records. In fact, he is one person responsible for making such records. He is also a custodian of records at plaintiff and has based his declaration on a review of plaintiff's records. Cosme qualifies the records as business records under California's Evidence Code. Cosme identifies and authenticates the Commercial Finance Agreement attached to the verified Complaint (Cosme verified the complaint). Under the terms of the agreement California Freight agreed to make 36 monthly payments of $1,176.80 commencing August 15, 2014, but missed the May 15, 2015 payment and has made no further payments such that the sum of $34,449.58 is now due. Cosme also identifies and the portion of the agreement which grants plaintiff a security interest in the trailers.

If the failure to attach the required agreement is overlooked, plaintiff has established the probable validity of its claim.

2. Wrongful Detention, Manner of Possession, Reason for Detention

Plaintiff next attempts to establish that defendants are wrongfully detaining the property. The application checks the boxes that this information is in the verified complaint and in the "attached declaration" (Cosme's Declaration is separate, not attached.) These documents establish only *California Freight* had possession when the trailers were purchased. They do not offer any reason to suspect that *Singh* ever had possession of the trailers. (The Court notes only Singh has been served with the Complaint and Writ papers.) Code of Civil Procedure section 516.030 provides that affidavits in support of writs of possession must set forth "[t]he facts stated" "with particularity." "Except where matters are specifically permitted by this chapter to be shown by information and belief, each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein." (Code Civ. Proc., § 516.030.) The manner the defendants came into possession of the property is an element which cannot be established on information and belief. (Code Civ. Proc., § 512.010, subd. (b)(2).)

No facts are incorporated which tend to show that Singh remains in possession of the trailers in Item 5 of the Application, "A showing that the property is wrongfully detained by the defendant" (Code Civ. Proc., § 512.010, subd. (b)(2)) is not one of the factual showings that can be made on information and belief.

Although the reason for detention may be established on information and belief (Code Civ. Proc., § 512.010, subd. (b)(2)), neither document offers any reason for the continued detention of the trailers.

3. Description of the Property

The equipment is particularly described and valued at $34,500. (Cosme Decl. ¶¶ 9, 17; Application Item 4.)

4. The Location of the Property

The Application states:

> The personal property items are stored or parked at 3611 N. Blythe Ave., Fresno CA when not in operation or use. This is the address that defendant California Freight, Inc. has provided to the California Secretary of State's office as their principal place of business.

(Application Item 6.)

While the application is signed under perjury, there is no basis for how this is within the declarant's personal knowledge. Second, this is not the address of record for California Freight, Inc. with the Secretary of State.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/11/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 503